BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

ROBERT TAYLOR GOULD Claimant	)	
V.	)	
WRIGHT TREE SERVICE, INC. Respondent	)	Docket No. 1,068,630
AND	)	
CANNON COCHRAN MANAGEMENT Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the March 12, 2015, Award entered by Administrative Law Judge (ALJ) Steven J. Howard. The Board heard oral argument on July 14, 2015. John G. O'Connor of Kansas City, Kansas, appeared for claimant. P. Kelly Donley of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

The ALJ found claimant's September 3, 2013, injury by accident did not arise out of and in the course of his employment. The ALJ denied all workers compensation benefits.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant argues the use of flammable liquid was a safety hazard directly associated with his job. Claimant states, "The [causal] connection contemplated by K.S.A. (2011 Supp.) 44-508(f)(2)(B)(i) can certainly be found in the fact that Claimant's accident and injury presumably would never have happened 'but for' the fact that his shirt had become soaked in gas before he absentmindedly lit his cigarette."[1] Claimant contends his accident arose out of and in the course of his employment, and he should be compensated for a 7

[1] Claimant's Brief (filed Apr. 20, 2015) at 3.

percent permanent partial whole person impairment in addition to the payment of his past medical expenses and the right to future medical treatment.

Respondent maintains claimant's accident occurred because he recklessly violated a workplace safety rule, precluding him from workers compensation benefits. Further, respondent argues claimant's injury arose from a personal or neutral risk, and no causal connection existed between the required work conditions and the resulting accident. Alternatively, if claimant sustained a compensable injury, the evidence shows he sustained a 7 percent permanent partial whole body impairment.

The issues for the Board's review are:

1. Did claimant's September 3, 2013, injury by accident arise out of and in the course of his employment with respondent?

2. If so, what is the nature and extent of claimant's disability?

3. Is claimant entitled to future medical benefits?

FINDINGS OF FACT

Claimant began employment with respondent as a groundsman in 2013, shortly after graduating from high school. Claimant worked with his foreman, dragging brush cut from trees and completing tasks set for him by his foreman. Respondent's employees generally worked in two-person crews. Respondent allowed smoking by groundsmen while working, providing it occurred at least 10 feet from any flammable liquid.

On September 3, 2013, claimant and his foreman, Joe Bruch, worked a job located in a rural area near Tonganoxie, Kansas. Claimant testified Mr. Bruch directed him to fill a chainsaw with gasoline and oil. Claimant explained he filled the chainsaw, but while he was handing the chainsaw to Mr. Bruch, the gas cap fell from the chainsaw and gasoline spilled onto claimant's shirt. Claimant then refilled the chainsaw, replaced the gas cap, and gave the chainsaw to Mr. Bruch. Claimant testified he did not mention the spill to Mr. Bruch, nor did Mr. Bruch provide any instruction. Mr. Bruch disputed claimant's testimony, stating he offered to loan claimant a clean shirt until he could change his clothes. Mr. Bruch further indicated he instructed claimant to relax for the few minutes needed to complete the job. Mr. Bruch was trimming branches in a lift while claimant remained on the ground.

Claimant testified he then moved out of the drop zone, 10 feet from the machinery where his foreman was working, and lit a cigarette. Claimant's shirt immediately caught fire, and he was burned while trying to extinguish the flames. Claimant testified the accident was unintentional. Claimant stated he was aware the gasoline was on his shirt, he knew gasoline was a flammable liquid which could ignite, but he was "not thinking" when

he lit the cigarette.[2] Claimant was a volunteer firefighter in Winchester, Kansas, though no training was required to volunteer.

Mr. Bruch became aware of the incident when claimant began to yell. Mr. Bruch testified he administered basic first aid and returned to the company truck, where he contacted the general foreman, Aaron Swallow. Mr. Swallow arrived and transported claimant to Prompt Care in Lawrence, Kansas. Claimant was directed to the emergency room at Lawrence Memorial Hospital, where he was given morphine before transferring by ambulance to the burn unit at the University of Kansas Hospital (KU Med). Claimant remained at KU Med for a week, where he underwent skin graft surgery. Claimant remained off work until his release on November 13, 2013, when he returned to work for respondent.

Claimant was not reprimanded or disciplined by respondent for the events of September 3, 2013. Greg Williams, division manager, investigated the incident. Mr. Williams testified he felt there were grounds for claimant's termination, but claimant was not fired. Mr. Williams explained it is not the practice of respondent to terminate an employee while recovering from an injury. Additionally, respondent anticipated a lay off soon after claimant's return and knew claimant would be included. Claimant and a number of his coworkers were laid off by respondent in December 2013.

Claimant stated he did not review, nor was he expected to review, any employee handbook. Claimant indicated he attended safety meetings while at respondent, but what to do after spilling gasoline on oneself was never discussed. Claimant testified he was never told by a supervisor not to smoke near flammable liquids, but he knew better than to do so.[3]

Mr. Williams testified all new hires were provided an employee handbook by the general foreman. In addition to the employee handbook, a foreman's manual, which includes respondent's safety and fire prevention policies, is kept in every company truck and made available to all employees. Portions of the manual are reviewed at tailgate safety meetings held by foremen at least once a week. Mr. Williams testified that while foremen are expected to be familiar with the manual, groundsmen are under no obligation to review the entire manual before starting work. Mr. Swallow conducted the tailgate meetings claimant attended. Mr. Swallow testified he did not recall specifically reviewing respondent's fire prevention policy prior to September 3, 2013.

Court-ordered physician Dr. Terrence Pratt examined claimant on September 25, 2014, for purposes of an independent medical evaluation. Claimant denied discomfort,

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[2] R.H. Trans., Joint Ex. A at 8 (Claimant's Depo. at 31).

[3] See R.H. Trans. at 24.

weakness, numbness, functional limitations, or psychiatric issues. Claimant was not using medication or lotion and reported he was "functionally intact" at the time of the examination.[4] Dr. Pratt reviewed claimant's medical records, history, and performed a physical examination. Dr. Pratt determined claimant had a history of full-thickness burns to the right abdomen and axilla, superficial partial-thickness burns to the face, neck, and chest, and was status post-debridement with skin grafting. Dr. Pratt noted claimant did not require active medical care, but instead required maintenance care in the form of sun protection and ointment.

Using the AMA *Guides*,[5] Dr. Pratt provided a rating opinion:

> Utilizing page 13/280, table 2, he has class I involvement, which has a range of 0 to 9% impairment of the whole person. He has signs and symptoms of a skin disorder. There are no significant limitations in performance of activities of daily living. The sun exposure may temporarily result in involvement and only intermittent treatment is required. Considering the degree of the burns, the skin grafting that was necessary, I would consider him to have 7% permanent partial impairment of the whole person.[6]

PRINCIPLES OF LAW

K.S.A. 2013 Supp. 44-501b(c) states:

> The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2013 Supp. 44-508(h) states:

> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

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[4] Pratt IME at 1.

[5] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[6] Pratt IME at 3.

K.S.A. 2013 Supp. 44-508(f) states, in part:

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

. . .

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3) (A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . .

(C) The words, "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to employees while engaged in recreational or social events under circumstances where the employee was under no duty to attend and where the injury did not result from the performance of tasks related to the employee's normal job duties or as specifically instructed to be performed by the employer.

K.S.A. 2013 Supp. 44-501 states, in part:

(a) (1) Compensation for an injury shall be disallowed if such injury to the employee results from:

(A) The employee's deliberate intention to cause such injury;

(B) the employee's willful failure to use a guard or protection against accident or injury which is required pursuant to any statute and provided for the employee;

(C) the employee's willful failure to use a reasonable and proper guard and protection voluntarily furnished the employee by the employer;

(D) the employee's reckless violation of their employer's workplace safety rules or regulations . . . .

ANALYSIS

1. Did claimant's September 3, 2013, injury by accident arise out of and in the course of his employment with respondent?

The ALJ found the risk associated with smoking by claimant was a personal risk, one not associated with his employment. The Board disagrees. The risk of working around gasoline and the fact claimant spilled gasoline on his shirt prior to lighting the cigarette is a work-related risk.

The ALJ cited *Laturner v. Quaker Hill Nursing, LLC*,[7] and *Adams v. Hospira, Inc.,*[8] in support of his finding that cigarette smoking is a personal risk. Neither *Laturner* nor *Adams* apply. Both *Laturner* and *Adams* involved claimants who were injured on their lunch breaks, and neither were on the clock at the time of their accidents. Neither *Laturner* nor *Adams* were performing work duties at the time of their accidents. Both *Laturner* and *Adams* made a personal choice to clock out and go to their employers' respective smoking areas and smoke a cigarette.

In *Keil v. Brown's Tree Service*,[9] a claimant drained gasoline from a vehicle to put in a generator. Gasoline got on the claimant's clothing and ignited when someone nearby lit a cigarette. The Board Member in *Keil* found obtaining gasoline for the generator was an incident of the claimant's employment and concluded the claimant's accident arose out of and in the course of his employment. In *Birdsall v. Shawnee Mission Ford, Inc.*,[10] a claimant burned himself when he lit a cigarette during a break while his hands were drenched with flammable brake fluid. The Board Member found the claimant was injured while taking a cigarette break authorized by his employer.

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[7] *Laturner v. Quaker Hill Nursing, LLC,* No. 1,059,381, 2012 WL 6101119 (Kan. WCAB Nov. 1, 2012).

[8] *Adams v. Hospira, Inc.,* No. 1,069,056, 2014 WL 3055469 (Kan. WCAB June 12, 2014).

[9] *Keil v. Brown's Tree Service*, No. 1,026,400, 2006 WL 1275467 (Kan. WCAB Apr. 7, 2006).

[10] *Birdsall v. Shawnee Mission Ford, Inc.,* No. 259,090, 2001 WL 403281 (Kan. WCAB Mar. 29, 2001).

In this claim, claimant worked and smoked cigarettes at the same time. Respondent allowed this practice to occur. Respondent benefitted by claimant not taking time away from his duties for a smoke break. The claimant's clothes were saturated, to some extent, with gasoline, which is work-related and without which the claimant would not have been injured.

Respondent also argues this claim is barred because claimant violated a safety provision that states smoking is prohibited when handling or working around flammable liquids. Claimant testified there was no handbook he was expected to review and he did not review any handbook.[11] Respondent acknowledges in its brief claimant may not have known about the policy.

Greg Williams testified the fire prevention policy is not a part of the handbook, but instead is a part of the foreman's manual kept on every truck. The foreman's manual is not provided to the regular employees, but is available to them if they want to peruse its contents.[12] There is no evidence suggesting claimant reviewed the foreman's manual containing the fire prevention policy.

Respondent cites *Valenzuela v. Basic Energy Services, LP,*[13] in support of this argument. In *Valenzuela*, the Board Member wrote:

> Recklessness contemplates something beyond ordinary negligence or carelessness. To conclude claimant acted with recklessness, the preponderance of the credible evidence must support his conscious disregard of a known or obvious risk that exceeds negligence. Recklessness is akin to gross, culpable or wanton negligence, but is a lesser standard than intentional conduct. Here, claimant knew he was not to put his hand in moving machinery, but did so anyway.

Kansas criminal law defines reckless conduct in K.S.A. 2011 Supp. 21-5202(j):

> A person acts "recklessly" or is "reckless," when such person consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.

At the time of his injury, claimant was no longer directly handling flammable liquids, although he did have some gasoline on his shirt. Even if claimant was working around flammable liquids at the time he was injured, there is no evidence he knew of the policy

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[11] See R.H. Trans., Joint Ex. A at 8 (Claimant's Depo. at 29-30).

[12] See Williams Depo. at 14.

[13] *Valenzuela v. Basic Energy Services, LP,* No. 1,065,257, 2013 WL 5521853 (Kan.WCAB Sept. 17, 2013).

prohibiting his conduct, although claimant testified he knew better than to smoke around flammable materials. One cannot violate a policy, recklessly or otherwise, if one is not aware of the policy. The act of lighting a cigarette after he resumed his work activities was careless but does not rise to the level of recklessness.

2. What is the nature and extent of claimant's disability?

Both parties argue claimant suffers a 7 percent whole person functional impairment. The Board agrees. Dr. Pratt provided the only opinion regarding permanent impairment. Dr. Pratt assessed a 7 percent functional impairment related to claimant's work-related injuries.

3. Is claimant entitled to future medical benefits?

Dr. Pratt indicated in his report that claimant did not require active medical care. He agreed claimant required maintenance care for protection from sun exposure and the use an ointment recommended by claimant's personal physician. Dr. Pratt does not comment on whether the recommended maintenance care involved included prescription or over-the-counter medications. Based upon Dr. Pratt's comments, claimant has failed to meet the burden of proving he will need medical treatment in the future.

CONCLUSION

Claimant suffered an injury by accident arising out of his employment. Claimant did not commit a reckless violation of respondent's workplace safety rules or regulations. Claimant suffers a 7 percent whole person functional impairment as a result of his work-related injury by accident. Claimant failed to meet the burden of proving he will need medical treatment in the future.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Steven J. Howard dated March 12, 2015, is reversed.

Pursuant to K.S.A. 2013 Supp. 44-510h, claimant is entitled to the payment of medical expenses related to his September 3, 2013, injury by accident, incurred prior to the regular hearing of this matter.

The claimant is entitled to 16.43 weeks of permanent partial disability compensation at the rate of $299.13 per week or $4,914.71, followed by 12.62 weeks of permanent partial disability compensation at the rate of $502.07 per week or $6,336.12, for a 7 percent whole person functional disability, making a total award of $11,250.83.

As of August 25, 2015, there would be due and owing to the claimant 16.43 weeks of permanent partial disability compensation at the rate of $299.13 per week in the sum of $4,914.71, plus 12.62 weeks of permanent partial disability compensation at the rate of $502.07 per week in the sum of $6,336.12, for a total due and owing of $11,250.83, which is ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of August, 2015.

_____
BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

DISSENT

The undersigned disagrees with the majority's finding that this claim arises out of and in the course of claimant's employment with respondent. The act of putting a cigarette in one's mouth and lighting it is purely personal in nature and has no work-related purpose. K.S.A. 2013 Supp. 44-508(f)(3)(A)(iv) specifically excludes injuries that arise out of risks personal to the worker. Claimant's injuries would not have occurred had he not chosen to smoke a cigarette and arise directly out his decision to light the cigarette. The undersigned would affirm the ALJ's decision denying this claim.

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BOARD MEMBER

c: John G. O'Connor, Attorney for Claimant
jack_oconnor2000@yahoo.com

P. Kelly Donley, Attorney for Respondent and its Insurance Carrier
kdonley@mcdonaldtinker.com
pschweninger@mcdonaldtinker.com

Steven J. Howard, Administrative Law Judge